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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

8 KIMBERLEY J. DAVIS,

9 Plaintiff,

10 v.

11 PORT ANGELES SCHOOL DISTRICT et
12 al.,

13 Defendant.

Case No. C20-5448-BHS-SKV

ORDER GRANTING IN PART AND
DENYING IN PART MOTION FOR
LEAVE TO AMEND ANSWER AND
AFFIRMATIVE DEFENSES

14 **I. INTRODUCTION**

15 Plaintiff Kimberley J. Davis brought this action against her former employer, Port
16 Angeles School District (“PASD”), and two of its employees, Amity Butler and Patricia
17 Reifensahl, alleging gender discrimination and retaliation. (“Compl.” Dkt. 1). Currently before
18 the Court is Defendants’ Motion for Leave to Amend their Answer to (1) assert the affirmative
19 defense of failure to exhaust administrative remedies, and (2) clarify that Defendant Reifensahl
20 passed away in fall 2020. (“Mot.” Dkt. 22). Having considered the parties’ submissions, the
21 case record, and the governing law, the Court orders as follows:

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II. BACKGROUND

Plaintiff was employed by PASD as a certified teacher of students with special needs from August 2001 until February 2020. Compl. ¶¶ 4.1, 4.82. On September 6, 2019, Plaintiff filed a formal complaint with PASD alleging discrimination on the basis of her sexual orientation and identifying Defendants Butler and Reifensahl (among others) as the primary perpetrators of the discriminatory conduct. *Id.* ¶ 4.77. On or around September 17, 2019, Plaintiff filed a charge of discrimination with the Seattle office of the U.S. Equal Employment Opportunity Commission (“EEOC Charge”). *Id.* ¶ 4.78. In the EEOC Charge, Plaintiff alleged that the discrimination in question took place between January 1, 2019, and June 13, 2019, (“EEOC Charge Period”). (“Clifhorne Decl.” Dkt. 23, Ex. 1 at 4). Subsequently, on March 9, 2020, Plaintiff received a Right to Sue letter from the U.S. Department of Justice. (“Resp.” Dkt. 25 at 2). Plaintiff then filed this lawsuit on May 12, 2020, alleging gender discrimination and retaliation in violation of federal and state law. *See generally* Compl. On July 30, 2020, the Court issued a Pretrial Scheduling Order, which required both parties to file amended pleadings by September 24, 2020. Dkt. 15.

On June 12, 2020, Defendants filed their Answer asserting a number of affirmative defenses to Plaintiff’s claims. Dkt. 11 at 11–12. Defendants’ Answer did not allege that Plaintiff failed to exhaust her administrative remedies prior to bringing this action. *See id.* Then, on February 16, 2021, Defendants deposed Plaintiff. Mot. at 2, 4. Defendants allege that in her deposition, Plaintiff did not identify any acts of discrimination that occurred during the EEOC Charge Period. *Id.* Defendants now seek leave to amend their Answer to assert the affirmative defense of failure to exhaust administrative remedies. Defendants argue that amendment is proper because it will not prejudice Plaintiff, they did not unduly delay in moving for leave to

1 amend following Plaintiff's deposition, and amendment would not be futile. *Id.* at 3–4.
2 Defendants also argue that there is good cause to permit them to amend their Answer after the
3 Scheduling Order's September 24, 2020, deadline because they only became aware of the
4 alleged inconsistencies between Plaintiff's EEOC Charge and her deposition testimony when
5 they took her deposition in February 2021. *Id.* at 4.

6 Plaintiff opposes Defendants' Motion on the ground that permitting amendment at this
7 stage would prejudice her, and because Defendants' Motion is futile and frivolous. *Resp.* at 3–4.

8 III. DISCUSSION

9 In arguing for leave to amend, Defendants' Motion focuses primarily on the liberal
10 amendment policy of Federal Rule of Civil Procedure 15(a). While it is true that there is a
11 "strong policy in favor of allowing amendment" under Rule 15(a), *Kaplan v. Rose*, 49 F.3d 1363,
12 1370 (9th Cir. 1994), that standard is not applicable here. Instead, once a court has entered a
13 pretrial scheduling order establishing a deadline for the amendment of pleadings, Federal Rule of
14 Civil Procedure 16(b) governs. *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607–08
15 (9th Cir. 1992).

16 Under Rule 16(b), the Court first determines whether there is "good cause" to amend the
17 scheduling order.¹ *Id.* at 608; Fed. R. Civ. P. 16(b)(4). Unlike Rule 15(a)'s more lenient
18 standard that primarily considers the bad faith of the moving party and any prejudice to the
19 opposing party, Rule 16(b)'s good cause standard "primarily considers the diligence of the party
20 seeking the amendment." *Johnson*, 975 F.2d at 609. In other words, "[t]he district court may

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22 ¹ Here, Defendants have not moved to amend the Scheduling Order under Rule 16(b). Instead,
23 they have moved for leave to amend their Answer under Rule 15(a). Under such circumstances, courts
have construed a party's untimely motion to amend a pleading under Rule 15(a) as a motion to also
amend the scheduling order under Rule 16(b). *See, e.g., Williams v. Perdue*, No. C19-0444-JCC, 2020
WL 5893408, at *1 (W.D. Wash. Oct. 5, 2020); *LifeLast, Inc. v. Charter Oak Fire Ins. Co.*, No. C14-
1031JLR, 2015 WL 12910683, at *2–3 (W.D. Wash. July 6, 2015). The Court does so here.

1 modify the scheduling order ‘if it cannot reasonably be met despite the diligence of the party
2 seeking the extension.’” *Id.* (quoting Fed. R. Civ. P. 16 Advisory Comm. Notes (1983
3 amendment)). If the party seeking the extension “was not diligent,” then good cause does not
4 exist and the inquiry should end. *Id.* But if the Court determines that good cause exists, it must
5 next assess whether the proposed amendment is proper under Rule 15(a). *Id.* at 608.

6 In *Johnson*, the plaintiff sought an extension of time to add the actual owner of the ski
7 resort at which he was injured as a defendant. *Johnson*, 975 F.2d. at 606–07. The incorrectly
8 named defendant moved for summary judgment after the scheduling order’s joinder cut-off date.
9 *Id.* The district court granted the defendant’s motion and declined to allow the plaintiff to amend
10 his complaint. *Id.* After reviewing the record, the Ninth Circuit found that the incorrectly named
11 defendant had not hidden relevant facts or attempted to mislead the plaintiff regarding the
12 identities of the real parties in interest. *Id.* at 609–10. As a result, the Court determined that the
13 plaintiff had not acted with reasonable diligence in complying with the scheduling order’s
14 joinder deadline, so could not establish good cause for the requested modification. *Id.* See also
15 *Nat’l Prod. Inc. v. Arkon Res., Inc.*, No. C15-01553RSL, 2016 WL 9224046, at *4 (W.D. Wash.
16 Nov. 8, 2016) (denying defendant’s untimely motion for leave to amend its answer under Rule
17 16(b) when defendant claimed plaintiff was at fault for failing to produce relevant documents,
18 but the documents in question were either publicly available or not explicitly requested by
19 defendant in discovery); *Precor Inc. v. Fitness Quest, Inc.*, No. C05-0993L, 2007 WL 136749, at
20 *1 (W.D. Wash. Jan. 12, 2007) (denying plaintiff’s untimely motion for leave to amend its
21 complaint under Rule 16(b) when plaintiff claimed defendant had withheld necessary
22 information, but the information in question had been disclosed to plaintiff in a declaration
23 months prior). See also *Williams*, 2020 WL 5893408, at *1 (denying plaintiff’s untimely motion

1 for leave to amend his complaint under Rule 16(b) when plaintiff failed to adequately explain a
2 good cause reason for permitting the amendment).

3 Here, Defendants likewise fail to demonstrate that they acted with the requisite diligence
4 to permit them to amend their Answer after the deadline to assert the affirmative defense of
5 failure to exhaust administrative remedies. According to Defendants, because they “were not
6 aware of the discrepancy with Ms. Davis’s EEOC charge” prior to the deadline for amending
7 pleadings, they have good cause for not moving to amend their Answer before then. Mot. at 4.
8 But Defendants do not explain how the alleged discrepancies between the EEOC Charge and
9 Plaintiff’s deposition testimony led them to believe that Plaintiff failed to exhaust her
10 administrative remedies or support their conclusion that she has. The Court infers Defendants
11 are arguing that Plaintiff has not exhausted relative to conduct her Complaint alleges occurred
12 before the EEOC Charge Period. But if that is the case, Defendants were aware that Plaintiff
13 was relying on that conduct when she filed her Complaint. Thus, with reasonable diligence, they
14 should have included the defense of failure to exhaust in their initial Answer.

15 Moreover, the deposition excerpts provided by Defendants do not support their position.
16 The excerpts seemingly identify questions and responses pertaining either to discriminatory
17 conduct witnessed by a third party or to isolated incidences of discrimination that Plaintiff’s
18 Complaint alleges occurred in January 2019 and on June 13, 2019, within the EEOC Charge
19 Period. *See* Clifhorne Decl., Ex. 2 at 7:1–10:25. They do not identify questions that were
20 intended to elicit all instances of discrimination Plaintiff allegedly experienced during the EEOC
21 Charge Period. *See id.* Further, Defendants themselves acknowledge that Plaintiff did identify
22 two possible instances of discrimination during the EEOC Charge Period in her deposition. *Id.*
23 ¶ 3. First, Plaintiff stated that “a first grade student was placed in a different classroom, in

January 2019,” which Plaintiff explicitly attributed to discrimination in the deposition excerpts provided by Defendants. *Id.* ¶ 3, Ex. 2 at 9:6–15. Second, Plaintiff stated that she “received notice alleging that Plaintiff falsified student records, in June 2019.” *Id.* ¶ 3. But even if Plaintiff’s deposition had not, her Complaint outlines numerous such instances, *see* Compl. ¶¶ 4.58–4.76, and the deposition excerpts provided by Defendants fail to establish the inconsistencies they allege.

Given this, Defendants' Motion, supporting declaration, and exhibits do not provide a good cause basis for permitting Defendants to amend their Answer after the deadline to assert the affirmative defense of failure to exhaust administrative remedies. Their Motion as to this proposed amendment is therefore denied. With regards to Defendants' proposed amendment to clarify that Defendant Reifensahl passed away in fall 2020, the Court's limited research indicates that her passing occurred after the deadline to amend pleadings. As such, the Court finds good cause for permitting Defendants to amend their Answer as to Defendant Reifensahl, and their Motion is granted.

IV. CONCLUSION

For the foregoing reasons, Defendants' Motion for Leave to Amend their Answer to assert the affirmative defense of failure to exhaust administrative remedies is DENIED. Defendants' Motion for Leave to Amend their Answer to clarify that Defendant Reifenhast passed away in fall 2020 is GRANTED. Defendants are instructed to file an amended Answer that conforms with this Order by **June 8, 2021**.

Dated this 25th day of May, 2021.

Skate Vaughan

S. KATE VAUGHAN
United States Magistrate Judge